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SENSITIVE

STATE FOR EAP/BCLTV; INL/AEE; L/LEI (Sandage)

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SUBJECT: GVN RESPONSE TO DRAFT LOA

Ref: Wise/Gatz fax of 6/27/03

1. (U) This is an action request. Please see paragraph 3.

2. (U) Embassy received MFA's long-awaited response to the draft LOA on counternarcotics on June 26. It appears that the USG and GVN views still differ in the areas of taxes, immunities, certification, and Leahy. Full text of GVN response in para 5.

3. (U) ACTION REQUEST: Post requests that Department consider the GVN response and provide a formal response.

4. (SBU) COMMENT: While there is still a long way ago, we find it mildly encouraging that the MFA finally responded. The detailed and lengthy response may demonstrate that the GVN, while still holding its ground on what it views as the key issues, is at least making a good faith effort to keep the process moving. END COMMENT.

5. (U) Begin Text --

DRAFT LETTER OF AGREEMENT ON US-VN COUNTERNARCOTICS COOPERATION

Vietnam has carefully studied the latest draft Letter of Agreement on Counter-Narcotics Cooperation between the USG and the GVN (LOA) presented by the US and the accompanying non-paper.

Actually, a number of consultations on the papers have been held between the two sides. Vietnam has expressed and shared the need to enhance cooperation of the two countries, including in this field.

In the discussions, Vietnam has also explained its points and made suggestions that it believes to have taken care of the legitimate concerns and interests of both sides.

Again, Vietnam wishes to share the following comments and suggestions in the hope that this would further speed up the concurrence of the two sides.

COMMENTS AND SUGGESTIONS

TITLE OF THE LOA

- The addition of 'and Law Enforcement' is newly added and needs to be clarified as it may expand the scope of the LOA beyond counternarcotics cooperation.

- The Title should be kept as: 'Letter of Agreement on Counternarcotics Cooperation between the Government of the United States of America and the Government of the Socialist Republic of Vietnam,' which would already cover the law enforcement element of counternarcotics cooperation.

Part I: General

- It is proposed to place the 2nd and 3rd sentences in paragraph 2 ('Total US assistance... Law Enforcement Affairs') as a 3rd paragraph of Part II ('Project Description'), as they relate directly to the proposed projects and their possible extension (future funding).

STANDARD PROVISIONS

3. Property and Personnel

3.A. Property:

- Paragraph 1, last sentence: The 'sale of property' in this paragraph should be read together with the 'import and disposition of property' in 7.A.

- While the property imported into Vietnam is free of taxes (7.A.), it is not always true that the funds derived from the sale of such property could be all designated as from the project. The price of certain items of such imported property, if sold on Vietnam's market, could be much more appreciated because of the

taxes. Let's give a technical example to clarify this:

A car imported into Vietnam free of taxes:	10,000 USD
-- Import tax (10,000 x 100%):	10,000 USD
-- Special excise/VAT (2x10,000x100%):	20,000 USD
-- Actual market value at import:	40,000 USD

(30,000 USD different and not from the project, if sold in Vietnam)

70% Original value after 2 years:	7,000 USD
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70% Actual market value after 2 years:	28,000 USD
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(21,000 USD different and not from the project, if sold in Vietnam)

In both cases, the difference is the tax to be paid by the purchaser, not the seller, and is the tax revenue of the GVN.

- The last sentence of 3.A.1. should be then revised to take care of the above distorted price, for example: 'Funds, which are to be derived from the sale of any property furnished by the USG to a project in accordance with the provisions of 7.A., shall be used in the furtherance of the objectives of that project.'

- See also comments and suggestions on 7.A. on the sale/disposition of the property: the law of Vietnam provides that such property is to be taxed on the part of the purchaser if sold in Vietnam and is to be tax exempt if re-exported. As result, it must be understood that the property imported tax-free, if sold on Vietnam's market, can only be bought at a price equivalent to 'actual market price minus eligible tax' and the purchaser, not the seller, shall be obliged to pay this tax amount.

3.B. Personnel: Paragraph 1

- See comments and proposals on Annex 1 (Certification).

3.B. Personnel: Paragraph 2

- The last sentence is not what had been previously consulted and agreed and it is unreasonable to require written agreement of the USG in this case (of positioning Vietnamese officials).

- Vietnam proposes to retain the previously agreed wording: 'This requirement may be waived by appropriate notification to the USG by the GVN.' Vietnam can also accept the addition of 'written' before 'notification' if the US so wishes.

15. Applicable Laws: Paragraph B:

- Vietnam prefers to retain what had been previously consulted and agreed with regard to the last phrase: 'or otherwise agreed by both parties' (instead of the currently revised wording: 'or otherwise authorized by the USG').

17. Taxes: Paragraph A:

- The 'disposition' of property in this paragraph should be viewed in the context of the comments made on the last sentence of 3.A.1. above.

- The law of Vietnam provides that such property is to be taxed on the part of the purchaser if sold in Vietnam and is to be tax exempt if re-exported. As a result, the property imported tax-free, if sold on Vietnam's market, can only be bought at a price equivalent to 'actual market price minus eligible tax' and the purchaser, not the seller, shall be obliged to pay this tax amount.

- Paragraph A should be revised as follows: Delete the two words 'disposition' in the paragraph and add the following to the end of the paragraph: 'and the disposition of any such property shall be made in accordance with the law of the Socialist Republic of Vietnam, which provides for the exemption of taxes if re-exported or the obligation of the purchaser to pay the required taxes if sold in Vietnam.'

17. Taxes: Paragraph B:

- The provision in this paragraph is not justified and is beyond the law of Vietnam and usual international practices.

- Under law, Vietnam can only provide preferential taxation treatment similar to that applicable to ODA projects and in the case of double taxation avoidance agreement, even in the absence of such an agreement between the two countries. Paragraph B should be revised accordingly.

18. Status of USG Personnel in Vietnam: Paragraph A:

- It is unreasonable to demand the full privileges and immunities equivalent to the staff of the US Embassy (diplomatic mission) to the 'persons' mentioned in this paragraph who are not related to any diplomatic responsibilities, are only on short-term missions (few days to one or two weeks) and may include consulting firm personnel from the US or third countries.

- Vietnam proposes that: these 'persons' shall be accorded with the privileges and immunities similar to those granted to personnel of other countries working with an ODA project. This provision, as in the case of other countries, would adequately ensure the full discharge of their missions under the LOA.

- (It should be noted that initially there had been a provision included in the draft which would stipulate: the USG personnel working in Vietnam under the agreement shall observe the laws effective in Vietnam).

18. Status of USG Personnel in Vietnam: Paragraph B:

- As explained on 8.A. above, Vietnam proposes that: such personnel shall be accorded preferential taxation treatment similar to that granted to personnel of other countries working with an ODA project.

- In the current draft: The addition of 'and not resold in Vietnam' is welcome but that alone is not yet adequate. It is not justifiable to request the same import tax exemption treatment as is accorded to diplomatic agents of the US Embassy and the exemption of income tax with respect to 'income earned while in Vietnam' (this may apply only to the income earned from the project).

19. Annex Two:

- See comments and suggestions on Annex 2.

10. Termination: Paragraph B:

- Paragraph B is totally new and the addition has not been consulted. Further, this paragraph is just to re-incorporate the problematic elements of the proposed US exclusive right to terminate, which would bring the drafting back to the initial stage of the discussions in the 1990s. The US had dropped it years ago. Vietnam had then explained that both sides would equally have 'the right to terminate' their respective obligations under the agreement and this would be covered by 10.A.

- Vietnam again insists on the deletion of this Paragraph B.

Annex One (Certification):

- Vietnam holds that the law of Vietnam, not that of the US, applies here, especially in the case of criminal prosecution (all acts and activities serving as grounds for prosecution would be on the territory of Vietnam, not that of the US, including the training to be provided under the LOA). The GVN would subject its personnel to the law of Vietnam only, while it shall ensure the nomination of 'qualified' personnel.

- On the other hand, the US concerns would be already guaranteed in all stages of consultations on considering, granting and execution of the training, by rejecting a nominee or terminating the training of a person concerned.

- Vietnam therefore proposes: either not to annex such a provision of certification; or, to revise Annex One as follows:

(i) Delete the Notice and its two footnotes; and,
(ii) Replace the current paragraph 2 with a new one: 'I understand that the USG and the GVN may terminate my training if it is determined that I engaged in the above conduct during the last ten years or during my training funded under the LOA.'

- Proposed revision (i) is to solve the issue of the applicability of law especially in the case of criminal prosecution; proposed revision (ii) is to stipulate the natural and legitimate right of both Vietnam and the US to terminate a person's training, especially when the training is expected to be on the territory of Vietnam and for personnel from Vietnam.

- Vietnam had earlier proposed to have both GVN and USG personnel to execute a certification, which is not included here, but is still seen as relevant as all involved in one same exercise, either with one role or the other, would be so required.

Annex Two (Leahy Amendment):

- As consistently explained, Vietnam recognizes the

importance of protecting human rights but rejects the use of human rights as a condition for aid provision and as a pretext for interference in the internal affairs of states.

- Vietnam prefers the deletion of this Annex from the LOA. If the US finds it mandatory to stipulate its responsibility under its law, this stipulation should only be a statement of the fact and should be general in nature to serve the purpose of stipulating that fact.

- Vietnam therefore proposes the Annex to be as follows:

'Annex Two

The USG and the GVN recognize the importance of protection of human rights and this Annex is made pursuant to the provisions of Article 9 of the LOA.

On the US Leahy Amendment Provisions

The USG holds that the protection of human rights is an important element of any bilateral agreement of this nature. It is bound by the US Leahy Amendment Provisions, which stipulate that USG narcotics (and crime) control assistance is conditioned on the active protection of human rights on the part of recipient governments.'

- Vietnam believes that the above has adequately taken care of the USG responsibility. Vietnam cannot accept the current paragraph B of the Annex. The following will be subjected to further consultations: If the US really needs it and as an accommodation, Vietnam could, at the most, consider a following addition:

'and that, in certain cases, USG assistance or funds, including the funds covered by this agreement and its annexes, may not be provided to a foreign government, unless the US Secretary of State certifies otherwise.'

- The above proposals are for the purpose of accommodation. In all cases, Vietnam had wished and had proposed either to delete the Annex or to add in the Annex the following: 'No governments, agencies or individuals, including those of the US and Vietnam, are entitled to interpret this Annex on the US Leahy Amendment Provisions as to make an assessment or judgment on human rights of other states, or to use them as a condition for assistance or as a pretext for interference in the internal affairs or affairs under the jurisdiction of other states.'

Annex Three (Projects):

- While the 'Standard Provisions' of the LOA are yet to be discussed and agreed, the projects proposed in the Annex have not been touched upon. Those projects, both the content and scope, shall be subject to later consultations by the two sides.

- The US has also recognized that the US Department of State does not prepare project documents and that once the LOA is concluded, the scope, timing, and implementation of the proposed projects can be determined by the implementing agencies of the two sides.

The discussion of this issue between the USG and the GVN has been initiated at least since 1997. Understanding has been reached, progress has been made and concurrence has been achieved on both the need to enhance cooperation in this field and on many elements in the drafting.

This should be built upon to expedite the drafting of the LOA. In particular, at this stage of consultation, the two sides should devote their focus, on the one hand, on the main elements directly related to counternarcotics cooperation, and on the other, on how best ensure and accommodate the legitimate concerns of both sides, rather than just to re-institute what is termed as 'standards' but has no relevance in the case.

Vietnam respectfully presents the above comments and proposals out of the will of accommodation and in the hope to facilitate the early conclusion of the drafting of the LOA on counternarcotics cooperation of the two countries.

Vietnam hopes that they would be accepted or otherwise commented in the same spirit of understanding and accommodation.

(Hanoi, June 2003)

End text

PORTER